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Commissioners and the Ombudsman and the infrastructure of Welsh Governance: lessons from Wales and lessons for Wales

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Policy Briefing Report:

Commissioners and the Ombudsman and the infrastructure of Welsh Governance: lessons from Wales and lessons for Wales

**Findings of a seminar organised by the Institute of Welsh
Politics and Centre for Welsh Legal Affairs
Aberystwyth University, Spring 2014**

Elin Royles and Dyfan Powel

Seminar context

One of the main features of Wales' distinctive governance arrangements since 1999 has been the establishment of Commissioner and Ombudsman offices. In March 2014, academics at Aberystwyth University arranged an inter-disciplinary seminar with the objective of critically examining, within a comparative UK and Ireland context, the role of Commissioner and Ombudsman offices within the political and administrative structures of devolved Welsh governance (see seminar programme on page 13).

It was deemed timely to organise a seminar on this topic under 'Chatham House' rules bringing together senior-level practitioners and academics in this field in the Welsh devolved context with counterparts from other parts of the UK and Ireland. Its timing coincided with the announcement in February 2014 of a Review into the Children's Commissioner for Wales (which subsequently led to the establishment in June 2014 of an independent review into the role and functions of that office). Proposals were also underway for the creation of a Future Generations Commissioner for Wales that subsequently formed part of the Well-being and Future Generations (Wales) Bill introduced in the National Assembly for Wales in July 2014. At the UK level, the UK Parliament's Public Administration Committee reported in April 2014 on its review of the Parliamentary and Health Services Ombudsman and discussions were ongoing on the potential implications of the EU Directive on Alternative Dispute Resolution to be implemented from July 2015.

To date, valuable academic work has considered individual Commissioners in Wales (e.g. the Children's Commissioner, the Older People's Commissioner for Wales, the Welsh Language Commissioner). However, that work has not been brought together to reflect more broadly upon the position of the Commissioners and the Ombudsman in Wales and this is therefore an understudied academic area that has major policy implications for the future nature of Welsh governance. Accordingly, the seminar's intention was to reflect more holistically upon the position of the Commissioner and Ombudsman offices in a devolved Wales. In a comparative perspective, the seminar sought to examine various factors relating to Commissioners and Ombudsmen, particularly their legal status and accountability, their relations with executives and legislatures, their policy-making input and the implications of multi-level governance and the multi-level division of competences within the devolved UK.

We are very grateful to the Institute of Welsh Politics, the Department of International Politics, the Department of Law and Criminology and the Sir David Hughes Parry Fund, all forming part of Aberystwyth University for their financial support for the seminar and to the Presiding Officer Dame Rosemary Butler for sponsoring the event. Dyfan Powel and Gwenan Creunant provided highly effective organisational support for the seminar. Many thanks also to the speakers, chairs and attendees for their contribution to an event that attempted to reflect on, and influence, the future shape of devolved Welsh governance.

Executive Summary and Recommendations arising from the Seminar

The seminar highlighted the extent to which Welsh Commissioners have developed their roles in their respective fields. It also underlined the merits of a single Welsh public services Ombudsman compared to the multiple ombudsmen in England. A number of examples of good practice were identified in the seminar and on this basis Wales can be considered as an exemplar. Based on the seminar's deliberations, the following recommendations can be made in order to sustain and enhance Commissioners' and the Ombudsman's role in Welsh governance:

1. Efforts should be made to produce a firmer and clearer definition of a 'Commissioner'. Alternatively, steps could be taken to address the potential misconceptions and expectations emanating from the lack of clarity and consistency relating to their responsibilities and functions.
2. To ensure independence, there is overwhelming consensus that Commissioners should not be appointed by the government, but probably by the legislature. Any reviews of Commissioners and establishment of new offices should consider the need for greater consistency in the appointments and funding process leading to a model of formal appointment by the legislature.
3. In response, the National Assembly for Wales needs to review its procedures and arrangements for scrutiny of the Commissioners and the Ombudsman to ensure that accountability processes are in line with international best practice. The 'triple lock' solution (see page 9) should be considered as a means of ensuring sufficient scrutiny of Commissioners and Ombudsmen.
4. Any reviews of Commissioner and Ombudsman offices and the establishment of new offices need to consider the issue of appointment length and renewal of post. This should ensure transparent arrangements to enhance their independence and integrity. Serious consideration should be given to making unrenovable fixed term appointments uniform.
5. There is a tension between ensuring accountability and guaranteeing independence. In order to maintain independence from the executive but ensure some mechanism for dealing with serious problems, it was suggested that there might be consideration of a 'nuclear option' of a 2/3 majority vote of the legislature to remove a Commissioner or Ombudsman from a post.
6. 'Own-initiative' powers should be considered as a means of enhancing the Ombudsman role.
7. In relation to their powers, the problems and lack of clarity surrounding the jurisdiction of Commissioners and the Ombudsman in relation to non-devolved services and competences within Wales need to be resolved. One potential option would be to include these issues in the context of any Silk Commission Part II developments.

8. Greater consideration is required regarding the scrutiny of private sector organisations as they are increasingly coming into the jurisdiction of the Ombudsman and Commissioners as public services providers.
9. Measures could be considered to generate greater clarity and accountability regarding the roles of Commissioners during the policy process (see page 11). In addition, attention could be given to ways of strengthening the legislature's understanding of the Commissioners and the Ombudsman's capabilities and capacities. One potential consequence could be to encourage greater use of the offices.

Part 1 – Key issues: The Commissioner and Ombudsman offices in Wales to date: an overview

The strengths of current Commissioners and Ombudsman models in Wales

Whilst Commissioners have a more distinctive advocate role, the Ombudsman role in the UK is driven by individual complaints regarding maladministration or failure of a service. Following investigation, they may develop a role in advocating for the complainant. The investigation following an individual complaint can potentially contribute towards improving public services.

Overall, through their functions of inquiry, scrutiny and calling others to account, the Ombudsman and the Commissioners in Wales were deemed to be vitally important to ensuring social justice and to service delivery improvements. Attention was drawn to the innovative aspects associated with Commissioners and they present potential models for developments in other jurisdictions. An illustrative example was interest from Australia in Wales' Older People's Commissioner. Equally, the Public Services Ombudsman for Wales holds an exemplar position both in the UK and beyond.

Commissioners

Amongst the strengths associated with the Welsh Commissioners were the following:

- a proactive approach to promoting rights and welfare rather than solely reacting to unsatisfactory conduct;
- a potentially valuable and influential role in the legislative process in the context of law reform. It must however be noted that the Welsh Language Commissioner has a different position to the other Welsh Commissioners in enforcement and regulation due to the power to issue compliance notices;
- their use of broader European, international and human rights benchmarks e.g. European Convention on Human Rights and international instruments such as the United Nations Principles for Older People and the UN Convention on the Rights of the Child;
- Welsh Commissioners' involvement with other Commissioners across the UK and Ireland with the potential for greater involvement with their respective positions in the EU and globally.

Ombudsman

The Public Services Ombudsman for Wales Act 2005 established a single public services ombudsman bringing together the previous functions of different Ombudsmen. As it was based on the post-devolution Scottish legislation it attempted to reflect the cutting edge Ombudsman legislation of its time. Its success can be evaluated according to the criteria set up by the Ombudsman Association validation scheme applicable to every ombudsman in the UK. The criteria include the following principles:

- Independence
- Fairness
- Openness and transparency
- Accountability
- Compliance to good governance
- Good complaints handling

The strengths of the Welsh scheme are clear in the way in which the Ombudsman's re-validation was one of the few schemes that passed through without comment as it fully complied with the requirements. Other specific examples of the strengths of the Welsh arrangements were noted:

- The reporting arrangements on investigations are less restrictive than other cases thus strengthening the potential learning from investigations;
- In addition to the reporting role, the Office has the capacity to be involved in settling or resolving complaints;
- It has broad discretion as to whether to investigate or not;
- It has the power in legislation to operate with others, including commissioners.

Collaboration and networks

A final strength across Commissioners and the Ombudsman is the collaboration and networks between them. They have enabled sharing developments and information, and avoiding reinventing the wheel. In Wales, the advocacy role of Commissioners and the investigation role of the Ombudsman have worked well together. The establishment of Memoranda of Understanding have formalised relations and provide a way of balancing workloads and roles.

Collaboration between Commissioners and the Ombudsman have led to arrangements that facilitate clarity and simplification for the complainant in the Welsh case and are examples of good practice:

- A Common portal in Wales that deals with public utilities and directs people to other ombudsmen etc.;
- The backroom arrangements, working relationships and practices between the Ombudsman and Commissioners work well.

Reflections and Challenges

1. Accountability, independence and appointment

The general principle voiced was that if a body or an individual is established to advocate on behalf of particular groups of people, they should be independent of the Welsh Government. The Public Services Ombudsman for Wales is appointed by and receives funding from the Assembly, not the Welsh Government, thus making the lines of accountability very clear. The rigorous appointment process includes formal appointment by the whole Assembly. The Ombudsman's funding autonomy from government was deemed to be unusual and viewed as a significant way of avoiding circumstances where a government could limit the capacity of an Ombudsman. Accountability to the Assembly has been improved by moving from scrutiny in plenary to scrutiny by a committee.

In contrast, Commissioners are accountable to and scrutinise the Welsh Government. In practice, Commissioner appointments have involved an open recruitment process, with the decision made by the First Minister based on the recommendations of an appointments panel (of Assembly Members), and in some cases involving stakeholders. Whilst the Government had posited that this treated candidates in a fair and consistent way, the current appointments and funding arrangements were questioned in view of the Paris Principles requirements for 'national human rights institutions' and their particular stress on independence from government. The Assembly has received representations regarding the accountability and transparency of Commissioners. Consequently, it was suggested that the growing opinion is that Commissioners should be appointed by and be accountable to the National Assembly for Wales.

2. Appointment length and renewal of post

The length and renewal of post and arrangements for removal from office were also considered to be critical issues. There are variations in the length of appointment between a fixed term of 7 years or alternative arrangements where Commissioners can be reappointed after a four years term to a subsequent term. The suggestion was that a longer single term might work better. If renewable terms are utilised, an established process for determining whether an individual should have a second term is required. That renewal arrangements are lacking in transparency is an issue in the UK, Ireland and internationally, thus leading to the argument for clear criteria.

3. Powers and structures

Issues were raised regarding the division of responsibilities between Commissioner and Ombudsman offices in Wales and at the UK level.

- For the Ombudsman, non-devolved services in Wales are currently under the jurisdiction of the Parliamentary Ombudsman (UK). A case could be made to transfer all issues in Wales to the Public Services Ombudsman for Wales. This would result in a more comprehensive response to people in Wales who do not necessarily distinguish between public services.
- There were also examples that highlighted the need to consider circumstances where Commissioners are unable to intervene which manifest themselves in Wales

because they related to non-devolved issues. In the Children's Commissioner's case, they are able to speak out on any issue affecting children, but are unable to use their powers on non-devolved matters. This has created difficulties e.g. the plight of asylum seeker children within the initial accommodation centre in Cardiff. A review of the Children's Commissioner of England concluded that all matters relating to children should be within the remit of their respective Commissioners.

Other more specific constraints on powers were raised largely specific to the circumstances of individual Commissioners and the Ombudsman and in relation to particular policy areas. Of general relevance are:

- The need for the Ombudsman and the Commissioners' jurisdiction to keep pace with changes in public service. This includes whether binding remedies should be afforded to the Ombudsman to reflect the way in which private sector organisations are increasingly coming into their jurisdiction given that there is no parallel to the role of democratic processes which hold public bodies to account.
- The requirement in law for complaints to be in writing impedes some citizens from making complaints.
- The findings of the Local Government Ombudsman in England are binding in law.

4. Collaboration and cooperation

Building on the networks between some of the Commissioners and Ombudsman, these arrangements could be extended, for instance in the context of the creation of a Future Generations Commissioner for Wales. In addition, there is scope to consider the establishment of additional Commissioners, particularly in the context of the UN Convention on the Rights of People with Disability.

Part 2 - Key issues: Reflections and comparative insights on the legal status, powers and governance arrangements for Commissioners and Ombudsmen

International background

The Ombudsman was considered as one of the most significant constitutional innovations of the second half of the twentieth century, assuming a prominent constitutional position in states worldwide. Furthermore, the World Bank now demands that an Ombudsman is in place before they enter the process of lending money. This again suggests that the office is becoming a cornerstone of state governance. Although the same cannot be claimed with regard to Commissioners, a growth in Commissioner creation occurred at the end of the twentieth century.

Legal status of Ombudsmen

Independence is globally recognised as a value of Ombudsmen, alongside their perceived role in assisting the citizen in dealings with the state. Independence and autonomy from the executive need therefore to be preserved. It should not be perceived as being compromised by

overly close association with the very institutions and deliverers of services being scrutinised.

Ombudsmen are constitutionally recognised around the world. Although the option of protection within a superior constitution is not available to the UK, other tools are available for the preservation of independence and autonomy. The New Zealand model, for example, has a separate parliamentary committee that oversees the appointment and budget of ombudsmen and commissioners.

Powers

Traditionally, Ombudsmen powers are considered in two distinct categories:

- Those for fact-finding and dissemination of information. They are used best when Ombudsmen are proactive. Consequently, the power of own initiative is an effective and desirable addition to their toolkit of powers. Attention was drawn to the Irish case where the Ombudsman had own initiative powers since its inception. These have been used sparingly and own initiative investigations have proved very effective in revealing systemic failures.
- The ability to make use of findings to persuade, influence and make the case for public service providers to make changes. The ability to call service providers to account is a particularly effective tool for the Ombudsman.

In terms of Commissioners, attention was drawn to the importance of their powers to carry out thematic investigations. For instance, the Northern Ireland Older People's Commissioner can look at any issue she feels is related to older people thus providing a major level of discretion, underlining the limits on those Ombudsmen who do not possess own initiative powers.

Constraints and Challenges

Some of the constraints and challenges in comparative cases highlight some of the strengths of the Welsh arrangements or reiterate some of the limitations identified in the Welsh case.

- Attention was drawn to the implications of a lack of own initiative powers. It can place an Ombudsman in a difficult position of having to wait for a complaint before investigating it, often unable to address those areas where there are no complaints but where there may be concern. There is a strong case for 'own initiative powers', particularly in the field of mental health;
- It is increasingly the case that complainants do not have the financial resources to pursue matters through the courts. There are long waits in the courts system. One alternative would be to divert appropriate cases for an ombudsman's attention. There needs to be consideration of how best the courts and ombudsmen might interact and in relation to a more effective referral system;
- Complainants and individuals often don't have the resources to partake in judicial reviews. Supporting the complaints processes in the face of judicial review consequently becomes a particularly expensive process; this is a real resource issue.

- Other examples of constraints discussed were not being allowed to publish reports and issues regarding how work is disseminated, and substantial limits regarding reviewing legislation;

Additional issues include:

- the need for the work of Ombudsmen and Commissioners to be supported and promoted through strong links with the media and public service providers where possible and most obviously, with the legislature;
- The private sector is now a major provider of services without being accountable to the legislature. In such cases, different rules should apply i.e. Ombudsmen should have powers of legal enforcement.

Scrutiny of Commissioners and Ombudsmen

If Ombudsmen and Commissioners are to be independent from the executive, the relationship between the legislature and Ombudsmen and Commissioners must allow for effective scrutiny of their offices. There needs to be consideration of the level of scrutiny that is appropriate. Different methods of scrutinising their offices include judicial reviews of decisions, annual reports and appearing before the legislature. Fellow watchdogs, auditors and information commissioners offer a further means of scrutiny. If these are not robust enough in practice, a further 'triple-lock solution' could be considered:

1. Regular reviews asking elementary questions such as 'do we still need this service'? This could act as a necessary test to ensure the offices are still providing a relevant service.
2. The legislature could take the lead and coordinate a more systematic review of the sector rather than wait for failure to occur. Again, the New Zealand model with a particular committee overseeing the whole sector could be seen as good practice.
3. Finally, Commissioner and Ombudsman offices could take a lead on their internal governance arrangements to ensure they are robust before the more formal mechanisms are implemented. For instance, the Local Government Ombudsman in England responded to failings by adopting transparency as a guiding principle and by appointing an advisory board and a consumer forum, and is now considering external review schemes.

Coordination

The value of robust coordination mechanisms was also raised. The suggestion was that there may exist in Northern Ireland a problem of over-accountability due to the overlapping of organizations dealing with individuals.

Part 3 – Key issues: Experiences on the ground: Looking in greater detail and Concluding Comments

1. Definitions

The Ombudsman office conforms to a relatively standardised definition and an official validation process by the Ombudsman Association is in place to ensure that Ombudsmen

conform to the definition. In contrast, there is *no universal definition of a Commissioner* and while all broadly assume a similar role, there *can be considerable and substantive differences* between the various forms. There is however a *need to strive for clarity in Commissioners' roles* to ensure consistency in expectations and to avoid misconceptions of their functions and responsibilities. Overall, whilst there might be subtle distinctions between the definitions of the offices they require a level playing field that would include a high degree of independence and probity.

2. Appointment and independence

The independence of the office of Commissioner or Ombudsman is paramount to its perceived legitimacy and therefore a constant and key concern. The need to retain neutrality is central to the work of the Ombudsman in particular.

The *appointment process lacks consistency*. Whilst recognising the Welsh Government's considerable efforts to develop conventions to counter the potential problems of executive appointment, there is an overwhelming consensus that Commissioners should not be appointed by the executive but rather by the legislature. The importance of removing the threats to the perceived independence and politicisation of the office was considered to be acutely important in countries of single-party dominance such as Wales and in politicised policy fields such as the language. However, it must be borne in mind that accountability to specific committees can also threaten to politicise the agenda surrounding a Commissioner or Ombudsman.

Single fixed terms are seen as an effective tool to secure a measure of independence with re-election politicking taken out of the equation. Further measures to support the independence of the offices from the executive, while remaining some scope to deal with problems, include a 'nuclear option' for a 2/3 majority vote of the legislature to remove a Commissioner or Ombudsman from a post.

3. Powers

The '*own initiative*' power to investigate has proved of value to those Commissioners and Ombudsmen who wield it. More broadly, it is perceived as a means of increasing their contribution, and to improving public services. The use of such powers, however, is a matter of discretion for the individual Commissioner or Ombudsman. In theory, this highlights the need for independence and the influence of the personal political persuasion of the office or individual.

The extent of powers available to some offices extends to *recourse to the High Court*. Although coercive powers were rarely employed, their existence and the threat they hold have impact and are of value to the offices. The perception was that they facilitated the process of ensuring that much of the Commissioners' work with external organisations is done on the basis of cooperation.

There is scope and desire to '*tidy-up*' the powers of some Commissioners. For others, such as the Language Commissioner, it was probably too early to fully evaluate the powers bestowed upon the office. However, in the case of the Welsh Language Commissioner,

there did appear a need for enforcement powers to support the Welsh Language Standards (relating to the Welsh Language (Wales) Measure 2011).

The way in which Commissioners' work can cross into *non-devolved areas* can lead to nervousness and a lack of clarity regarding the use of powers. The conditions of older or younger asylum seekers would be one such example. Generally, if a non-devolved matter is subsidiary to a devolved matter then the Commissioner ought to be able to act.

4. Relations with institutions

Despite the potential threat of 'capture' and being too close to the Government, *good practice* currently exists in Wales. Plenary time is set for the discussion of Commissioner reports and there is a strong tradition of accepting recommendations. However, there is the equally important question of *implementation and of the Commissioner's or Ombudsman's ability to follow-up the recommendations* made. One suggestion was that Commissioners should lay reports before the legislature rather than the executive as their role is to scrutinise the executive. If this were pursued, further questions that would arise would include whether a report should be considered by a specific or dedicated committee.

There is some frustration at the *relationship with the legislature*. Efforts to raise the profile of the work have not been fruitful, nor have attempts at familiarising AMs with the work of Commissioners and the Ombudsman. A better understanding of the capabilities and capacities of the Ombudsman and the Commissioners may encourage greater and more effective use of the offices. Whilst attention must be given to their independence and ability to set their own priorities, they could potentially be requested to consider investigating specific fields that tends to be undertaken through public inquiries. With regard to raising the profile of their work, a plenary day for the Ombudsman as in Austria for example is one possibility.

5. Role in public policy making

The impact of Commissioners on policy development can be particularly difficult to assess. The main reason is that their interventions can take different forms at different stages of the process. For instance, intervention 'behind the scenes' and taking advantage of privileged access can be particularly effective, but difficult to assess or explain to the public. Early intervention can again prove effective but risks 'capture' and being seen as 'too close' to the policymakers. This in turn can jeopardise the perception of independence. Later intervention minimises the risks of 'capture' but lessens the Commissioner's influence over the policy. Clarity and accountability over the precise roles of the Commissioner during the policy process could alleviate some of these concerns. In attempting to influence the public policy process, it is important to ground intervention in evidence. There are several effective means of doing so; complaints received; thematic investigations; statutory investigations; advisory committees.

The Ombudsman office can also have a role in developing policy but again, intervention must be selective and based on strong evidence. The development and use of 'own initiative powers' would be valuable to the Ombudsman, allowing a far more proactive and valuable contribution to the policy process.

6. Relations between the Commissioners and the Ombudsman

Relations between the Commissioners seem good with only exceptional instances of conflicting views being expressed. Individual Commissioners also work within relevant European and international networks. There are good informal networks between the Commissioners and the Ombudsman in Wales. Beyond bilateral Memoranda of Understanding, it wasn't considered appropriate to formalise those networks at this point.

Nevertheless, as of yet the Welsh Commissioners have not undertaken work alongside each other though there may be scope to do so. Furthermore, there is some concern over potential overlaps in the responsibilities of offices. They are keen to avoid potentially adjudicating or acting in another's field. While collaboration is welcome, there is a strong notion that the sharing of back-office functions as occurs in Northern Ireland would not be suitable.

7. Relations with stakeholders and policy communities

To protect people's needs, the relationship between Commissioners and the policy communities is as important as the relationship with Government. A Commissioner being perceived as 'too close' to government can potentially be the cause of division and fragmentation within the policy community. Civil society and the broader policy community have a particularly important role in empowering the Commissioner. They provide evidence through consultation and are a source of the Commissioner's influence within the policy process. Similarly, the Commissioner can stimulate activity within civil society through its work.

However, the relationship between the Commissioner and the broader policy community has not yet been defined. There is concern that some actors may feel side-lined and ignored following the establishment and empowerment of a single office concerned with a specific field.

Programme: Commissioners and Ombudsmen and the infrastructure of Welsh

Governance: lessons from Wales and lessons for Wales

Convenors: Dr Elin Royles, Ann Sherlock and Prof John Williams, Aberystwyth University

Date: Thursday 20 March 2014

Sponsorship: Rosemary Butler AM, Presiding Officer National Assembly for Wales

9.30 - 10.00 Registration and tea and coffee, Pierhead building

Morning Chair - Elizabeth France, Vice President of Aberystwyth University and Chair of the Legal Ombudsman

10.00 **Introduction** Elizabeth France
Welcome speech Rosemary Butler AM, National Assembly Presiding Officer

10.15 - 11.15 **Session 1**
Commissioners and Ombudsmen in Wales to date: an overview
Professor John Williams and Ann Sherlock, Aberystwyth University
Peter Tyndall, Ombudsman and Information Commissioner, Ireland
Eleri Thomas, Deputy Children's Commissioner for Wales

11.15- 12.15 **Session 2**
Reflections and comparative insights on the legal status, powers and governance arrangements for Commissioners and Ombudsmen
Dr Richard Kirkham, University of Sheffield
Dr Tom Frawley, Northern Ireland Ombudsman
Evelyn Hoy, Chief Executive Commissioner for Older People Northern Ireland

12.15-1.15 Lunch

Afternoon Chair - David Melding AM, Deputy Presiding Officer, National Assembly for Wales

1.15-2.15 **Session 3 - Experiences on the ground: Looking in greater detail**
Breakout sessions
Groups: Children: Facilitator: Ann Sherlock, Aberystwyth University
Language - Facilitator: Prof. Diarmait Mac Giolla Chríost, Cardiff University
Older People - Facilitator: Prof. John Williams, Aberystwyth University
Other Ombudsmen and Commissioners: Dr. Richard Kirkham, Sheffield University

2.15 - 3.30 **Session 4 - Sharing of Findings and Conclusions: Lessons for Wales and Lessons from Wales?** Chaired by David Melding AM
Concluding Comments - Tony King, British Irish Ombudsman Association, Association Chair and The Pensions Ombudsman